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No. 03-314

In the Supreme Court of the United States

Richard Satava, et al.

Petitioners

v.

Christopher Lowry, et al.

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of *Amici* Ralph D. Clifford *et al.* Supporting Richard Satava's Petition for Writ of Certiorari

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Interest of the *Amici Curiae*[1]

Amicus Ralph D. Clifford is a law professor at Southern New England School of Law who specializes in intellectual property issues, specifically including the requisite creativity needed for copyright. *See, e.g.*, Ralph D. Clifford, *Intellectual Property in the Era of the Creative Computer Program: Will the True Creator Please Stand Up?*, 71 Tul. L. Rev. 1675 (1997). His only interest in the case is to assist in the interpretation of the Copyright Act, Title 17 of the United States Code as amended.

Amicus Bay Area Studio Art Glass [BASAG] is a non-profit association founded in 1975. It is comprised of professional glass artists and studios in the San Francisco, California area. Its members include a diverse group of artists who are recognized in both the national and international studio glass movement. BASAG provides its members with a variety of services including a forum to exchange information, experiences, techniques and ideas; referrals; networking; and opportunities for collaboration or participation in shows, festivals and galleries. BASAG's interest in the case is to restore copyright protection to the works of art produced by its members.

Amicus Robert Quade is a sculptor with a studio in Indiana. His statues vary from realistic portrayals of humans, particularly dancers, to abstracts. He distributes his work

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1. This brief was written exclusively by the *amici's* counsel with the generous financial support of the Southern New England School of Law. No counsel for a party authored any portion of this brief. The institutional affiliation of *Amicus* Ralph D. Clifford is for identification only as he does not purport to represent the position of his institution.

This brief is submitted with the written consent of the parties.

throughout the nation, including within the Ninth Circuit. His interest in the case is to seek a nationwide standard of copyright creativity to be able to protect his works, wherever they are.

Summary of Argument

Although a modicum of creativity is needed in order for a copyright to subsist in an expressive work, this Court has only addressed the evaluation of the quantity of creativity present in the context of a factual compilation. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). Because there are major differences between factual compilations and more fanciful works such as sculptures, the lower courts have no clear guidance regarding the requisite and some of their decisions have dissolved into what can only be described as exercises in judicial censorship, allowing copyright only if the judges subjectively appreciate the creativity of the work. Further, the imprecise standard of creativity for fanciful works has resulted in courts demanding novelty in expression before a copyright will be recognized. Consequently, adequately creative works are being denied copyright protection in some circuits. The case at bar is an excellent opportunity to clarify this area of copyright law and to resolve the inter-circuit disagreements.

Language in *Feist* instructs that copyrighted works should be based on a "creative spark." *Id.* at 345. This expectation of a conscious moment of inspiration in the creation of the work is not a realistic one given the manner in which the human brain works. The case at bar would allow refocusing of the creativity test, from expecting a "spark" to finding selection among expressive choices.

Argument

There are two reasons why this Court should grant the writ of certiorari. First, elaboration of the standard of creativity for fanciful rather than non-fiction compilations is needed. Second, clarification is needed to insure that the creativity required by the copyright law is of a character that is in keeping with the scientific understanding of how a human brain works.

I. A Writ of Certiorari Should Be Granted to Define the Minimal Creativity Requirements for Fanciful Works

In *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), this Court established that there is a threshold of creativity that must be contained within a compilation of facts in order for a copyright to subsist. *See id.* at 348. The Court stated:

> [T]he work [must be] independently created by the author (as opposed to copied from other works), and [must] possess[] at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.

Id. at 345 (citations and quotation marks omitted).

While the Court's opinion suggests that this creativity requirement is a requisite of all copyrighted works, not just compilations, *see id.*, the Court's discussion of creativity in the context of a factual compilation provides clouded guidance as to the nature of the requirement for more fanciful works such as the one in the case at bar. The resulting contradictory holdings of the circuit courts bear witness to the need for a clarifying ruling. *Compare, e.g., Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003) (disallowing copyright in an artistic glass jellyfish sculpture) *with Boisson v. Banian, Ltd.*, 273 F.3d 262 (2d Cir. 2001) (allowing copyright in much simpler quilt design).

For a compilation of facts such as that addressed in *Feist*, the analysis of creativity correctly scrutinizes the work to insure that it is comprised of something in addition to a simple list of facts. Consequently, some "selection and arrangement" of these facts must be found for a copyright to subsist. *Feist*, 499 U.S. at 348. The work before the Ninth Circuit in the case at bar, however, was not a compilation of facts; instead, it was a sculpture created to reflect the artist's impression of a jellyfish. *See Satava*, 323 F.3d at 807. As such, the type of extra scrutiny afforded by the Ninth Circuit when it examined what it identified as the component parts of Satava's statue followed by a determination that they had not been selected or arranged in a creative way, *see id.* at 810-11, was improper.

The Circuit's apparent insistence that Satava's work be novel, *cf. id.* at 812,[2] further demonstrates the lower court's

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2. "These elements are so commonplace in glass-in-glass sculpture and so typical of jellyfish physiology that to recognize copyright protection in their combination effectively would give Satava a monopoly on lifelike glass-in-glass sculptures of single jellyfish with vertical tentacles."

misunderstanding of *Feist* as the warning that copyright creativity does not require "novelty," *Feist*, 499 U.S. at 345,[3] was not effectuated. Many of elements that comprise Satava's statue were rejected by the Ninth Circuit because they were "standard, stock, or common." *Satava*, 323 F.3d at 810. Effectively, the Ninth Circuit's standard in dealing with realistic art discounts entirely the amount of intellectual labor needed to render a natural scene in an expression. *Cf. id.* at 813. After all, the creation of a life-like sculpture by one artist prevents no other artist from creating a similar sculpture as independent creation overcomes the presumption of copying. *See, e.g., Arnstein v. Edward B. Marks Music* Corp., 82 F.2d 275, 275 (2d Cir. 1936) (L. Hand); *Moore v. Kulicke & Soffa Ind., Inc.*, 318 F.3d 561, 573-74 (3d Cir. 2003); *Calhoun v. Lillenas Pub.*, 298 F.3d 1228, 1233-34 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 2251 (2003). If the Ninth Circuit's test is accurate, then works such as the petitioner's – or even works so clearly creative as John Audubon's *Birds of America* – would no longer be copyrightable.

At the same time, it would be inappropriate to suggest that no scrutiny is needed for fanciful works, particularly where the work is based on a realistic representation of something that actual exists. Indeed, it is exactly this point where copyright law has been incomplete articulated. The statement in *Feist* that a "creative spark" is needed, *Feist*, 499 U.S. at 345, does nothing to explain what is required; instead, the language is an invitation for the lower courts to find creative that which they appreciate while denying copyright to works which fail to satisfy the lower courts' subjective estimation of creative

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3. "Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."

works. Consequently, judicial censorship, much feared by this Court a hundred years ago in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903),[4] is the probable result of the current state of the copyright law.

This court should clarify the standard of creativity for fanciful works. At its core, *Feist* seemed most concerned with the choices that were available to and made by the author. *See Feist*, 499 U.S. at 348.[5] To expand the *Feist* holding to fanciful works, two prerequisites should be expected of an author. First, multiple ways should exist for an expression to be made and, second, the author should have made selections from these choices. *See id.* In other words, did the author, having a choice, *decide* to express the work in the way it was done; did the author "make a judgment, ... determine a preference; [or] come to a conclusion," *Random House Unabridged Dictionary* 517 (2d Ed. 1993), about the expression used? Without the guidance of this Court, however, the lower courts will continue to misconstrue the quantum of creativity required in fanciful works. This court should rectify the problem by granting certiorari in this case.

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4. "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. ... At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge."

5. "The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws."

II. A Writ of Certiorari Should Be Granted to Make the Copyright Creativity Requirement Consistent with Neuroscience

The *Feist* case describes the creativity requisite as requiring the author to create the work based on a "creative spark." *Feist*, 499 U.S. at 345. These two words appear to have caused many courts to expect a much higher level of creativity than the"crude, humble or obvious," *id.*, level *Feist* required. *See, e.g., J. Thomas Distrib., Inc., v. Greenline Distrib., Inc.*, 100 F.3d 956 at *2 (6th Cir. 1996) (table, opinion at 1996 WL 636138) (drawing of part lacks creative spark); *Southco, Inc. v. Kanebridge Corp.*, 258 F.3d 148, 152 (3d Cir. 2001) (part numbers lack creative spark); *Mid Am. Title Co. v. Kirk*, 59 F.3d 719 (7th Cir.) (title commitment lacks creative spark), *cert. denied*, 516 U.S. 990 (1995); *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366 (10th Cir. 1997) (command codes lack creative spark),

Describing creativity as was done in *Feist* leads to a judicial expectation that cannot be satisfied for more fanciful works than that involved in *Feist*. *See* Martha Woodmansee, *Response to David Nimmer*, 38 Hous. L. Rev. 231, 231 (2001).[6] In the case at bar, for example, the Ninth Circuit was expecting to find a moment of conscious inspiration which it could not find. *Cf. Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003).[7] In this expectation, the Ninth Circuit misapplied the intent

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6. Professor Woodmansee discounts a creative spark as a "Romantic (mis)representation of creative activity."

7. "Because the quantum of originality Satava added in combining these standard and stereotyped elements must be considered "trivial" under our case law, Satava cannot prevent other artists from combining them."

behind the constitutionally required creativity requirement of rewarding authors for expressing their ideas. *See Feist*, 499 U.S. at 349.

Further, describing creativity as a "spark" and expecting a conscious moment of inspiration is an inaccurate description of how the human brain works. *See* William H. Calvin, *The Cerebral Code* 21 (1996).[8] There is increasing scientific evidence that the primary source for novel thoughts is chance rather than conscious thought. *See id.*;[9] Henry Krystal & Andrew D. Krystal, *Psychoanalysis and Neuroscience in Relationship to Dreams and Creative* in Creativity and Affect 185, 196 (Melvin P. Shaw & Mark A. Runco, eds. 1994).[10] As Professor Calvin describes it, creative thoughts can be generated in a process that starts with chance, William H.

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8. Professor Calvin, a leading neuroscientist based at the University of Washington, explains that the scientific evidence regarding creativity supports the hypothesis that chance – rather than conscious thought – is the origin of creativity.

9. Among the six "essential aspects" of creativity are that "[v]ariant patterns ... be produced by chance.".

10. "One critical feature of any model of creativity is the ability to generate novel behavior. As we shall see below, 'chaotic,' nonlinear systems are capable of generating novel, unpredictable behavior and are, therefore, useful models of creativity."

Calvin, *The Cerebral Code* 21, noise, *cf. id.* at 66,[11] or an error, *cf. id.* at 100,[12] within the brain.

> Our more intelligent mental states are sometimes said to flirt around the "edge of chaos." This term is from complexity theory, which envisages an adaptive system that ranges between a rigid order and a more flexible disorder, controlling the degree of permitted disorder. We may range from satisfaction at getting something right (convergent thinking) to blue-sky divergent thinking; in those more creative moments, some of our cortical systems may be poised near the edge of chaos.

Id. at 67.

Consequently, the description of the constitutionally required creativity under the Intellectual Property Clause, U.S. Const. art. I, § 8, cl. 8,[13] should be reexamined to insure that the legal expectation of the needed creativity is realistic. While a

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11. The "pitter-patter of inputs" from outside of the brain can change the brain's response. Taking advantage of noise to generate creative ideas has been confirmed by artificial intelligence research. *See* Stephen Thaler, *Neural Nets that Create and Discover*, PC AI, May-June 1996, at 16, 16-18.

12. Professor Calvin notes that creative thoughts require "relaxing error correction" within the brain.

13. "The Congress shall have power ... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."

conscious "creative spark" may be impossible to identify, a pattern of choices is not. By requiring the lower courts to focus on this actual evidence of creativity, the risks of judicial censorship, as found in the Ninth Circuit in the case at bar, can be eliminated.

Conclusion

For the reasons discussed above, the Court should grant the writ of certiorari and examine the decision of the Ninth Circuit Court of Appeals. Having done so, this Court should reverse the decision below.

Respectfully submitted: September 25, 2003,

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